

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF SOUTHEAST TELEPHONE, INC.)	
FOR ARBITRATION OF CERTAIN TERMS AND)	CASE NO.
CONDITIONS OF THE PROPOSED)	2003-00115
AGREEMENT WITH KENTUCKY ALLTEL, INC.,)	
PURSUANT TO THE COMMUNICATIONS ACT)	
OF 1934, AS AMENDED BY THE)	
TELECOMMUNICATIONS ACT OF 1996)	

O R D E R

On August 7, 2003, SouthEast Telephone, Inc. (SouthEast) petitioned for arbitration of 20 issues between itself and Kentucky ALLTEL, Inc. (ALLTEL). ALLTEL filed a response on September 2, 2003, and included a petition for suspension or modification based on its fewer than 2% rural carrier status pursuant to 47 U.S.C. Section 251(f)(2). On September 23, 2003, SouthEast responded to ALLTEL s petition. On October 15, 2003, parties and Commission Staff held an informal conference. By the time of the informal conference, all but four issues had been resolved. These issues were presented by the parties in filings and at the hearing. Post-hearing briefs have been filed. The issues are now ripe for decision.

Allegations by ALLTEL Concerning Due Process

Before turning to the merits of this case, we must consider the allegations made by ALLTEL that it has been denied due process of law. At hearing, and in its post-hearing brief, ALLTEL argues that a SouthEast witness, Wesley Glen Maynard, should not have been permitted to take the stand in order to respond to questions relating to a

response SouthEast furnished to ALLTEL s data requests regarding the capability of the SouthEast switch. ALLTEL claims that the testimony was essentially live direct testimony, in violation of our procedural order requiring direct testimony to be prefiled. ALLTEL also objects to staff questioning on other issues presented in this case that were beyond the scope of SETel s prefiled direct. ¹ [I]ssue statements and Discovery responses are not evidence and are not prefiled direct testimony, ALLTEL states.² Accordingly, ALLTEL claims, no questions regarding statements so made should have been asked.

ALLTEL also alleges that our Staff demonstrated bias in this case. We take such accusations very seriously indeed, and have looked closely into the matter. It appears that the core of ALLTEL s argument here is based on two facts: (1) the Commission Staff Attorney on the case had called the attorney for SouthEast a day or two before the hearing to ask what SouthEast witness would answer questions by Staff in regard to statements made by SouthEast in its responses to data requests that were propounded by ALLTEL and that concerned the capabilities of SouthEast s switch; and (2) at hearing, Staff questioned SouthEast s witnesses on statements that appeared in the record but were beyond the scope of SouthEast s prefiled direct testimony. ALLTEL

¹ Post Hearing Brief on Behalf of Kentucky ALLTEL, Inc. (ALLTEL Brief) at 58.

² ALLTEL Brief at 58.

characterizes the telephone call as an improper *ex parte* contact,³ and refers to Staff's cross-examination as a presentation by Staff of a SouthEast witness conducted for the purpose of remedying weaknesses in SouthEast's case.

We reject any notion that the contact in question was inappropriate. As the Kentucky Court of Appeals explained in *Louisville Gas & Electric Co. v. Commonwealth ex rel Cowan*, 862 S.W.2d 897, 900 (1993), an *ex parte* contact is condemnable, *when it is relevant to the merits of the proceeding*. (Emphasis added.) See also *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Co.*, 86 F.Supp.2d 932 (W.D. Mo. 1999) (explaining that contact between close aides to the decisionmaker and a party about the *merits* of a decision should take place in the presence of all parties). (Emphasis added.) Thus, when there is an allegation that an improper *ex parte* contact has occurred, the key question is whether the contact in question concerned the merits of the proceeding. The phone call in question concerned a procedural issue (the identity of a witness to testify regarding the switch), not the merits of the case (the capabilities of the switch).

In attempting to establish that this tribunal is not impartial, ALLTEL further claims that Commission Staff presented SouthEast Witness Maynard.⁴ Actually, after

³ ALLTEL alleges, in fact, that Staff, by its own admission, conducted *ex parte* communications with SETel with respect to Staff's anticipated cross examination and deficiencies in SETel's direct case [ALLTEL Brief at 55]. In footnote 176 following this statement ALLTEL cites Transcript at pages 13-14. In fact, pages 13-14 of the Transcript do not contain an admission by Staff that it conducted any discussions whatever concerning deficiencies in SETel's direct case. The alleged admission appears at ll. 18-20 of page 13, and consists of these words: We do have questions about their responses to the data requests, and I asked who would be able to answer those questions.

⁴ ALLTEL Brief at 55.

objections from ALLTEL, which were overruled from the bench, the witness was presented by SouthEast's attorney, who established Mr. Maynard's identity and familiarity with the data responses to which he was to testify.⁵ ALLTEL also finds fault with the phrasing of Staff's questions, claiming they were leading and calculated to elicit direct testimony.⁶ ALLTEL further infers Staff bias from the fact that Staff did not cross the ALLTEL witness on the issue of SouthEast's switch,⁷ although ALLTEL witnesses testimony was extensive and although the switch in question belongs to SouthEast.

KRS 278.310 provides that, in conducting its hearings, the Commission is not bound by the technical rules of legal evidence. The rules of legal evidence concerning whether attorney questioning is leading, whether testimony is direct or in rebuttal, and whether cross-examination questions are within the scope of direct, are surely as technical as rules of evidence can be.

Further, Commission Staff's purpose is to ensure that all relevant facts are brought before the Commission, and that positions taken by the parties are adequately probed at hearing, so that the Commission can reach its decision based on a complete record. Here, SouthEast had made totally unsupported and unexplained allegations in response to data requests from ALLTEL, stating that SouthEast Telephone does not own, control, or utilize any type of switch, [sic] that is used to provide a qualifying

⁵ Tr. at 53-54.

⁶ ALLTEL Brief at 56-57.

⁷ ALLTEL Brief at 57.

service anywhere in Kentucky ;⁸ and SouthEast Telephone does not have a switch that is technically capable of providing a qualifying service in Kentucky. ⁹ We see no due process problem in our Staff s decision to probe these unsubstantiated statements. We also find no reason to believe that, if ALLTEL had made relevant and unsubstantiated responses to data requests with regard to which no witness was scheduled to appear, a Commission Staff Attorney would not have made the same call to ALLTEL that was made to SouthEast.

Parties before Commission cases are, of course, entitled to due process, to notice and opportunity to be heard. We find that ALLTEL received its due process rights, despite its objections to the rather more informal hearing than that which it appears to have anticipated. ALLTEL was certainly on notice that the capabilities of SouthEast s switch were at issue, having raised the issue itself. What s more, it has been extensively heard on the issue. Despite its claim that it was sandbagged at hearing when Mr. Maynard took the stand,¹⁰ it certainly did not seem unprepared to conduct meaningful cross-examination of Mr. Maynard. Its cross-examination of this witness fills 22 pages of the transcript¹¹ and covers such technical issues as the definition of qualifying services under Federal Communications Commission (FCC) decisions; whether there are numbers housed in SouthEast s switch that are identified

⁸ SouthEast Response to ALLTEL Data Request, Item No. 1, filed November 7, 2003.

⁹ Southeast Response to ALLTEL Data Request, Item No. 18, filed November 7, 2003.

¹⁰ ALLTEL Brief at 56.

¹¹ Our Staff Attorney s cross-examination fills only 9 pages.

in the LERG ; whether, if called, the numbers would pass through ALLTEL s tandem switch and be directed to [SouthEast s] switch ; whether SouthEast obtains transport from other CLECs; and so forth.¹²

Despite our findings that ALLTEL was accorded due process, and that our Staff properly executed its function in making every effort to ensure a complete and adequate record on the contested issues, in our decisions in this matter we will not consider any of the evidence submitted by Mr. Maynard for SouthEast. His testimony simply is not necessary to our decision in this case. Moreover, in order to avoid further unpleasant accusations against the Staff Attorney who appeared at hearing, we have removed her from the Staff team advising us on this case.

ALLTEL S Petition for Exemption from Certain Requirements of ILECs Pursuant to Section 251(f) of the Telecommunications Act of 1996.

ALLTEL, in its response to the petition for arbitration, requested that the Commission find that, as it is a carrier with fewer than 2 percent of the nation s subscriber lines, it is entitled to an exemption, pursuant to Section 251(f)(2) of the Telecommunications Act of 1996, from the ordinary incumbent local exchange carrier (ILEC) obligation to provide unbundled local switching and transport¹³ to competing local exchange carriers (CLECs). Pursuant to the statute, ALLTEL requests that the Commission find that the provision of unbundled switching and transport would (1) impose a significant economic burden on users of telecommunications services

¹² Tr. at 62-81; 214-216.

¹³ We treat these issues together, as the FCC has stated that unbundled local switching and shared transport are inextricably linked. TRO, Paragraph 534.

generally; (2) impose requirements that are unduly economically burdensome; and (3) be inconsistent with the public interest.

ALLTEL states in its testimony that provision of unbundled switching would lead to revenue loss by ALLTEL and increased rates for ALLTEL's remaining subscribers. ALLTEL further states that the provision of unbundled switching and transport to ALLTEL would trigger other carriers' right, under law, to opt-in to the agreements. If competing carriers request these UNEs, ALLTEL says, there will be pressure on ALLTEL's revenues and rates. ALLTEL further surmises that this would lead to rate increases to replace the revenue streams lost and would affect its ability and incentives to continue to invest in the Kentucky network. ALLTEL concludes that the combination of all of these things would not be in the public interest.

ALLTEL's position on this issue poses a number of problems, both legally and as a matter of policy. First, the Commission addressed arguments concerning the Telecommunications Act's rural exemption for portions of this same territory when it was owned by GTE South Incorporated (GTE South) in Case No. 1996-00313.¹⁴ In that case, the Commission concluded that the existing exemption afforded under 47 U.S.C. Section 251(f)(1) should be terminated. The Commission found, consistent with the FCC's guidelines, that Congress intended exemptions to be the exception rather than the rule and that GTE South had not established that there should be no competition in its Contel study area.

¹⁴ Case No. 1996-00313, Application of GTE South Incorporated for the Rural Telephone Company Exemption From Certain Requirements of the Telecommunications Act of 1996.

Next, we take note that ALLTEL previously apprised us, in the case in which we approved its acquisition of Verizon South Incorporated's (Verizon) telecommunications business in Kentucky, that it did not oppose providing unbundled switching or transport.¹⁵ There is no testimony to establish that circumstances have changed substantially since that time. Moreover, our ruling in Case No. 2001-00399, at 20, explicitly required ALLTEL, as a condition of its acquisition of Verizon's territory in Kentucky, to honor all interconnection agreements previously entered into by Verizon. Several of those agreements contain provisions entitling CLECs to the very unbundled switching and transport ALLTEL now says it should not have to provide.¹⁶

The ALLTEL acquisition of Verizon was not meant to require Kentucky's competitive telecommunications market to take so huge a step backward. In fact, pursuant to Kentucky statutes, we are not empowered to approve the acquisition of a utility unless such acquisition is in the public interest.¹⁷ We have interpreted the public interest standard to mean, at the very least, that no harm will accrue as a result of the acquisition:

This standard establishes a two-step process: first, there must be a showing of no adverse effect on service or rates; and, second, there must be a demonstration that there will be some benefits .[w]hile the standard does not require benefits to be immediate or readily quantifiable, the

¹⁵ Case No. 2001-00399, Petition by ALLTEL Corporation to Acquire the Kentucky Assets of Verizon South, Incorporated (Order dated February 13, 2002).

¹⁶ See, e.g., Agreement by and between Cinergy Communications Company and Verizon South, Inc., f/k/a GTE South Incorporated for the Commonwealth of Kentucky, at Network Elements Attachment (providing for unbundled network elements (UNEs), including the unbundled network platform (UNE-P)) and Agreement between Brandenburg Telecom, LLC and Verizon South (same).

¹⁷ KRS 278.020(5).

benefits referred to therein are what must be demonstrated after satisfying the first step by a showing of no adverse effect on service or rates.¹⁸

Pursuant to this standard, our Order in Case No. 2001-00399 is replete with our concerns that the competitive obligations of Verizon be met by ALLTEL after the acquisition. For example, we imposed conditions requiring operational support systems adequacy and compliance with interconnection obligations previously assumed by Verizon. Had ALLTEL wished to avoid those obligations, it should have made its position known to us in Case No. 2001-00399.

As a final matter, we note the process in which ALLTEL has requested a rural exemption is not in compliance with the statute. 47 U.S.C. Section 252(f) requires that a carrier requesting the exemption petition for it; it further gives a state commission 180 days to reach its decision. ALLTEL erred in waiting until a carrier requested interconnection to request an exemption. An arbitration proceeding is not only too brief to conduct the required analysis; it forecloses the participation of all other parties who may wish to interconnect with ALLTEL and who have the right to be notified and to be heard.

Accordingly, ALLTEL's request to be accorded an exemption from unbundled local switching and transport obligations should be denied.

¹⁸ Case No. 2002-00475, Application of Kentucky Power Company d/b/a American Electric Power for Approval, to the Extent Necessary, to Transfer Functional Control of Transmission Facilities Located in Kentucky to PJM Interconnection, LLC, Pursuant to KRS 278.218 (Order dated August 25, 2003), at 4-5; Case No. 2002-00018, Application for Approval of the Transfer of Control of Kentucky-American Water Company to RWE Aktiengesellschaft and Thames Water Aqua Holdings GMBH (Order dated May 30, 2002), at 7-8.

Access to Unbundled Local Switching and Transport

ALLTEL has also asserted to this Commission that it should not have to provide unbundled switching and transport to SouthEast due to the FCC's Triennial Review Order (TRO Order).¹⁹ Thus, this case presents us with something of an anomaly. This Commission is to enforce Section 251 of the Telecommunications Act,²⁰ an obligation which includes determining whether UNEs should be furnished to a CLEC on the basis that the CLEC's ability to provide the services it seeks to offer would be impaired if the UNEs cannot be obtained.²¹ Section 2(d) of Section 251 also provides, however, that the FCC is to set the standards for impairment. Rather than definitively setting those standards itself, the FCC, in its TRO Order, has delegated to the states the duty to evaluate the issue on an intrastate, market-by-market basis, and to include ILEC hot cut capacity in our analysis. Thus, we have instituted a separate proceeding, Case No. 2003-00397,²² to make these determinations. Here, however, we must decide the issue of impairment as it affects these two carriers alone, without having reached a final determination based on markets within Kentucky in our own TRO proceeding. Accordingly, we must use such standards as currently exist in the FCC's TRO Order.

¹⁹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand*, CC Docket No. 01-00338, rel. August 21, 2003 (TRO Order).

²⁰ 47 U.S.C. 252.

²¹ 47 U.S.C. 251(d)(2).

²² Case No. 2003-00397, *Review of Federal Communications Commission's Triennial Review Order Regarding Unbundling Requirements for Individual Network Elements*.

First, the FCC in its TRO Order presumes impairment when a CLEC seeks to provide to the mass market²³ qualifying services, e.g., those services that have traditionally been provided by ILECs, including local exchange service, local data service, and access services.²⁴ The services SouthEast seeks to provide are qualifying services. The FCC presumption of impairment is so strong, in fact, that it finds that a state could conclude that impairment exists even if the otherwise automatic triggers for a no-impairment finding are met: exceptional circumstances may preclude a state determination that there is no impairment in a given market, even when one of the triggers has been satisfied.²⁵

The guidelines provided by the FCC also include the statement that [s]cale economies, particularly when combined with sunk costs and first-mover advantages, can pose a powerful barrier to entry.²⁶ Accordingly, when an ILEC seeks to demonstrate that a CLEC is not impaired by inability to obtain UNEs, factors at issue include whether the cost differences caused by scale economies are sufficiently large and persistent, alone or in combination with other factors, to be likely to make entry uneconomic.²⁷ The FCC also found significant barriers in the mass market in the United States as a whole, including churn rate, high non-recurring charges, service

²³ Mass market customers are residential and very small business customers. TRO Order at 286, n. 1402.

²⁴ TRO Order, Paragraph 135.

²⁵ TRO Order, Paragraph 494, n. 1534.

²⁶ TRO Order, Paragraph 87.

²⁷ TRO Order, Paragraph 87.

disruptions, and ILEC difficulty in handling hot cuts.²⁸ ALLTEL has offered insufficient evidence to overcome the presumption that SouthEast will be impaired if it is denied unbundled switching and transport. Although it claims that SouthEast has options other than obtaining ALLTEL UNEs, including upgrading its own switch²⁹ and looking to other carriers for services, it simply does not establish that SouthEast's current economies of scale are sufficient to render the expense involved in such options anything other than a barrier to economical market entry.

We caution the parties that our decision in this matter is not to be considered a prejudgment of our final decision in Case No. 2003-00397. ALLTEL may refile all its arguments in this proceeding, as well as other arguments and evidence it deems appropriate, in Case No. 2003-00397. This proceeding, by virtue of its statutory deadline and its limitation as to parties, simply does not permit analysis of the complex factors that will be at issue in that case, including applicable markets. The difficulty is illustrated by ALLTEL's attempt to establish the geographic scope of the market that applies here under the FCC's granularity standards. However, its evidence on that issue is neither complete nor compelling. It suggests that the market be defined in unacceptably broad geographic terms, providing for a radius 200 miles in any direction

²⁸ A conference concerning, among other things, hot cut and collocation issues, is scheduled for January 14, 2004 in Case No. 2003-00379. These issues are among the many that the Commission will consider in that case.

²⁹ The evidence submitted by ALLTEL in this proceeding includes call detail records (CDRs) that purport to show that SouthEast's switch switches voice service. However, those CDRs do not show that the SouthEast switch has provided dial tone to local end-users.

from Lexington/Louisville and 200 miles from each wholesale provider of switching.³⁰

However, the FCC mandates that states

may not define the market as encompassing the entire state. Rather, state commissions must define each market on a granular level, and in doing so they must take into consideration the locations of customers actually being served (if any) by competitors, the variation in factors affecting competitors ability to serve each group of customers, and competitors ability to target and serve specific markets economically and efficiently using currently available technologies. [S]tate commissions should consider how competitors ability to use self-provisioned switches or switches provided by a third-party wholesaler to serve various groups of customers varies geographically and should attempt to distinguish among markets where different findings of impairment are likely. The state commissions must use the same market definitions for all of its analysis.³¹

The FCC also suggests that a state commission, in defining the markets, consider differences within the state based on retail ratemaking, the establishment of UNE loop rate zones, and the development of intrastate universal service mechanisms.³² ALLTEL's proposed market definition is not only too large; it is insufficiently supported by evidence required by the FCC's standards. Absent a finding on the threshold issue of an appropriate market definition, it is impossible to evaluate whether any of the FCC's trigger mechanisms have been satisfied. Further, other carriers who clearly have strong interest in the Commission's determinations in this matter have had no opportunity to comment.

Given the current standards and presumptions established by the FCC, the rights of other interested parties to weigh in on our ultimate determination as to the

³⁰ ALLTEL Brief at 25-26.

³¹ TRO Order at Paragraph 495.

³² TRO Order at Paragraph 496.

appropriate scope of telecommunications markets and impairment standards in Kentucky, the preexisting obligation of ALLTEL to honor interconnection agreements entered into by Verizon, including those requiring provision of UNE-P, and the record evidence here, we find ALLTEL has not adequately established that SouthEast is not impaired absent the availability of unbundled local switching and transport. Accordingly, ALLTEL must provide unbundled local switching and transport to SouthEast until and unless the Commission finds that mass market unbundled local switching and transport should no longer be made available as UNEs by ALLTEL in specific areas of the Commonwealth.

UNE Pricing

SouthEast objects to the prices ALLTEL offers for UNEs, and has proposed prices that are essentially the same as those they pay pursuant to their interconnection agreement with BellSouth Telecommunications, Inc. (BellSouth). ALLTEL has proposed that the prices set by the Commission under the Verizon agreements be used in this proceeding, with the exception of the pricing specified for unbundled local switching and transport. In our Order approving the sale of the Verizon properties in Kentucky to ALLTEL, however, we required ALLTEL to adopt the interconnection agreements of Verizon. UNE rates were contained therein. Those rates, therefore, continue to apply until we have concluded our process to establish UNE rates for ALLTEL in Administrative Case No. 382.³³ ALLTEL has been ordered to file its

³³ Administrative Case No. 382, An Inquiry Into the Development of Deaveraged Rates for Unbundled Network Elements.

proposed UNE rates no later than February 5, 2004. The Commission will rule as expeditiously as possible on the rates when they are filed.

SouthEast has not brought forth any evidence that the rates the Commission has set for Verizon would not be appropriate for ALLTEL to use in this interconnection agreement. The Commission, at this time lacking any substantive evidence that the costs of providing UNEs by ALLTEL would be any different than those of Verizon, finds that the rates previously approved by the Commission for Verizon and present in the Verizon interconnection agreements adopted by ALLTEL should be those that are available to SouthEast.

UNE Port Usage

The parties disagree whether ALLTEL should assess a port usage charge in addition to its fixed rate for unbundled local switching. ALLTEL claims that the usage portion is appropriate to adequately recover costs. SouthEast alleges that such a usage component is cost-prohibitive.

The Commission finds that a port usage charge is an appropriate component of unbundled local switching so long as it is cost justified. The Verizon UNE rates, as required herein, have included and should continue to include a port usage component until such time as they are amended by the Commission.

Reciprocal Compensation

The parties have agreed to a rate for reciprocal compensation; however, SouthEast has requested that the reciprocal compensation rate be applied to traffic destined for the Internet and terminating at an Internet service provider (ISP), as well as to voice traffic. ALLTEL disputes that the reciprocal compensation rate should be

applied to Internet traffic and proposes that Internet traffic be exchanged on a bill-and-keep basis. The FCC has concluded that ISP-bound traffic is not subject to the reciprocal compensation obligations of Section 251(b)(5) and that the appropriate cost recovery mechanism for this traffic is bill and keep.³⁴ Accordingly, the appropriate cost recovery mechanism for traffic destined for the Internet is bill and keep.

Interconnection and Direct Trunk Groups

The parties appear to disagree regarding the appropriate level of traffic that should exist between an ALLTEL end-office and SouthEast's Interconnection Point (IP) before direct trunk groups between the end-office and SouthEast's IP would have to be employed by SouthEast. ALLTEL claims that traffic exceeding a DS1 capacity is appropriate to require direct trunk groups while SouthEast maintains that a DS3 threshold is more appropriate. SouthEast further requests that the language in the agreement clarify that its IP may remain at its existing location regardless of the level of traffic being exchanged.

The Commission finds that a DS3 threshold is an appropriate level of traffic before direct trunks would have to be employed by SouthEast. The Commission further clarifies that, pursuant to our previous rulings on this issue,³⁵ SouthEast need only

³⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 and *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, FCC 01-131, Order of April 18, 2001.

³⁵ See, e.g., The Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, Case No. 2000-00404, Orders dated March 14, 2001 and April 23, 2001.

maintain one IP per LATA regardless of the level of traffic exchanged between the two companies.

IT IS THEREFORE ORDERED that the parties hereto shall file their interconnection agreement no later than 30 days from the date of this Order, incorporating the decisions reached herein.

Done at Frankfort, Kentucky, this 19th day of December, 2003.

By the Commission

ATTEST:


Executive Director